No. 00-261-CFX Title: New York, ex rel. Eliot Spitzer, Attorney General of New York, et al., Petitioners
v.
Microsoft Corporation

Docketed:
August 16, 2000 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Aug 15 2000	Petition for writ of certiorari filed. (Response due September 15, 2000)
	Aug 22 2000	Brief of respondent United States filed.
	Aug 23 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 23 2000	Brief of respondent Microsoft Corporation in opposition filed.
	Sep 26 2000	The petition for a writ of certiorari before judgment is denied. Statement by Chief Justice Rehnquist. (Detached opinion.)
		**********
	Sep 26 2000	ORDER ISSUED.

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No. 00-

IN THE

Supreme Court of the United States

STATE OF NEW YORK *EX REL.*
ATTORNEY GENERAL ELIOT SPITZER, *ET AL.*,

PETITIONERS,

v.

MICROSOFT CORPORATION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the district court's findings of fact and conclusion of law that Microsoft had violated Section 2 of the Sherman Act by illegally maintaining its monopoly in PC operating systems be upheld?

2. Should the district court's findings of fact and conclusion of law that Microsoft had violated Section 2 of the Sherman Act by attempting to monopolize the market for Internet browsers be upheld?

3. Should the district court's findings of fact and conclusion of law that Microsoft had violated Section 1 of the Sherman Act by tying its Internet browser to its operating system products be upheld?

4. Should the district court's award of remedial injunctive relief be upheld?

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The States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Utah, West Virginia and Wisconsin, as well as the District of Columbia (hereinafter the "States") respectfully petition for a writ of certiorari before judgment to review the Final Judgment of the United States District Court for the District of Columbia that was rendered in the above-entitled case as well as in *United States v. Microsoft Corp.*

Microsoft filed one Jurisdictional Statement for the appeals from the Final Judgment in both cases. Simultaneously herewith, the States are filing a response to Microsoft's Jurisdictional Statement, stating that their case is now properly before this Court pursuant to the Expediting Act. As a precautionary measure to provide an alternative basis for the exercise of jurisdiction by the Court in this appeal, the States also hereby petition for a writ of certiorari before judgment by the court of appeals.

OPINION BELOW

The district court's Findings of Fact, Conclusions of Law, and Final Judgment in this proceeding are reported, respectively, at 84 F. Supp. 2d 9 (D. D.C. 1999) (A46-A246), 87 F. Supp. 2d 30 (D. D.C. 2000) (A1-A43), and 97 F. Supp. 2d 59 (D. D.C. 2000) (A253-A279).[1]

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1. All of the relevant portions of the record are contained in the appendix to Microsoft's Jurisdictional Statement. Accordingly, the States are not filing a separate appendix with this petition, and all references herein are to the Appendix to Microsoft's Jurisdictional Statement.

STATEMENT OF JURISDICTION

As set forth in the States' brief in response to Microsoft's Jurisdictional Statement, this Court should exercise jurisdiction under the Expediting Act to review directly the appeals in the States' and the United States' actions against Microsoft. Nevertheless, as a precautionary measure, the States hereby invoke this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e) as an alternative basis for this Court's direct review of the appeal in their case.

Under 28 U.S.C. § 1254(1), the Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not yet been entered by the court. *See United States v. Nixon*, 418 U.S. 683, 692 (1974); *id.* at 686-87 (reviewing claims "because of the public importance of the issues presented and the need for their prompt resolution"). *Even the party that prevailed in the district court* (as the States did) may seek review on a petition for a writ of certiorari before judgment. *See id.* at 686-87, 690.

Under 28 U.S.C. § 2101(e), a petition for a writ of certiorari before judgment is timely filed "at any time before judgment" in the court of appeals. Because a notice of appeal has been filed by Microsoft in the States' case and that case has been docketed in the court of appeals, invocation of 28 U.S.C. § 1254(1) is proper. *See Nixon*, 418 U.S. at 692; *Gay v. Ruff*, 292 U.S. 25, 30-31 (1934); *Dames & Moore v. Regan*, 453 U.S. 654, 667-68 (1981); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 2.3, at 42 (6th ed. 1986).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 — and the state-law analogues to those federal provisions — are set forth at p. 1 of Microsoft's Jurisdictional Statement.

The Expediting Act, 15 U.S.C. § 29, states:

> (a) Court of appeals; review by Supreme Court. Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in such an action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

> (b) Direct appeals to Supreme Court. An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a).

28 U.S.C. § 1254(1) provides that cases in the courts of appeals may be reviewed by this Court as follows:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree[.]

28 U.S.C. § 2101(e) provides:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

STATEMENT OF THE CASE

The States adopt and incorporate herein the statements contained in their brief and that of the United States in response to Microsoft's Jurisdictional Statement.

REASONS FOR GRANTING THE WRIT

A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted under 28 U.S.C. §§ 1254(1) or 2101(e) "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. Rule 11.

This Court on several occasions has issued a writ of certiorari before judgment in situations where immediate Supreme Court review was necessary to resolve expeditiously questions of exceptional and wide-ranging public importance. For example, the Court issued a writ of certiorari before judgment in *Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("imperative public importance" and "disarray among the Federal District Courts" over constitutionality of sentencing guidelines statute), and *Dames & Moore*, 453 U.S. at 668 (issues arising out of presidential actions to secure release of hostages held by Iran "are of great significance and demand prompt resolution").

See also Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259 (discussing cases and standards applied).

The validity of the Final Judgment is one of the most pressing and important public questions under the antitrust laws to come before this Court since the amendment of the Expediting Act in 1974. *See* States' Response to Microsoft's Jurisdictional Statement ("States' Response"), at 5-6. Because the Final Judgment is subject to direct review by this Court pursuant to the Expediting Act, a writ of certiorari before judgment is warranted in aid of this Court's jurisdiction to review the Final Judgment under that Act. In such circumstances, granting direct review in the States' case would not constitute a "deviation" from normal appellate practice (*see* Sup. Ct. Rule 11 (stating that certiorari before judgment may be granted "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice")), because treating fully consolidated cases as a single proceeding on appeal is normal appellate practice.

I. Certiorari Before Judgment Is Appropriate In Aid Of The Court's Jurisdiction Under The Expediting Act.

This Court has recognized that exercise of its power to grant certiorari before judgment in the court of appeals is particularly appropriate where a similar or identical question is already before the Court in another case, and granting certiorari would therefore aid the Court in its direct review or resolution of that pending case. For example, in *Brown v. Board of Education*, 344 U.S. 1 (1952), the Court took

judicial notice of *Bolling v. Sharpe* then pending in the court of appeals, and invited the filing of a petition for certiorari before judgment in *Bolling* in order to consider issues similar to those in other cases pending in the Court. *See Brown*, 344 U.S. at 3. The Court subsequently granted certiorari before judgment in *Bolling*, 344 U.S. 873 (1952), after such a petition was filed. Similarly, in *Reid v. Covert*, 354 U.S. 1 (1957), where one of two related cases had been brought before the Court by direct appeal pursuant to 28 U.S.C. § 1252, the Court granted a petition for certiorari before judgment in another case raising the same issue, which petition was filed by the United States after prevailing in the district court. *See Reid*, 354 U.S. at 5.

In particular, the Court has recognized that certiorari before judgment is warranted where, as here, the *very same judgment* as to which direct review is sought is already before the Court on direct review of another case, so that consolidation of the related appeals in this Court offers the only way to resolve the entire judgment. This principle is so compelling that the Court has granted direct review of related aspects of the same judgment *even absent* the filing of a petition for certiorari before judgment or other express jurisdictional predicate. Thus, for example, in *Clinton v. New York*, 524 U.S. 417 (1998), the Court determined that it had authority under 2 U.S.C. § 692 — which allowed expedited review of claims brought by "any member of Congress or any individual adversely affected" by the Line Item Veto Act — to review directly two consolidated cases invalidating the Act. *See id.* at 428-29 & n.14. In a partial concurrence, Justice Scalia disagreed with the majority that the plaintiffs in one of those cases came within the scope of 2 U.S.C. § 692, but concluded that under the circumstances, direct review would have been warranted in any event pursuant to

a writ of certiorari before judgment if one had been filed "[i]n light of the . . . little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals[.]" *Id.* at 455 (Scalia, J., concurring in part and dissenting in part). Similarly, in *Roe v. Wade*, 410 U.S. 113 (1973), although the defendant was entitled to appeal directly only the denial of injunctive relief under 28 U.S.C. § 1253, the Court nevertheless reviewed the grant of declaratory relief because the arguments being raised were "necessarily identical." In so doing, the Court noted that "[i]t might have been preferable if the defendant . . . had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief." *Id.* at 123.

If this Court were to accept review of the Final Judgment in the United States' case pursuant to the Expediting Act but deny review of the appeal in the States' case to await developments in the court of appeals, the result would be a substantial delay in the ultimate resolution, and the risk of inconsistent disposition, of issues that are of the utmost public importance. Grant of the petition before judgment would be proper and indeed critical in aid of the Court's jurisdiction to review the Final Judgment under the Expediting Act. That Act was enacted to ensure that judgments in actions in which the United States is the complainant are quickly and finally resolved. *See* States' Response at 7-8. Such resolution would be frustrated if the merits of that judgment were also reviewed in a separate proceeding in the court of appeals.

II. Granting Direct Review In The States' Case Is Consistent With The "Normal Appellate Practice" Of Treating Cases Consolidated For Purposes Of Trial And Judgment In The District Court As A Single Proceeding On Appeal.

If the Court accepts jurisdiction to review the Final Judgment under the Expediting Act, granting certiorari in the States' case would be consistent with the Court's practice of ensuring that an entire consolidated proceeding is before it on direct review, and with the general federal practice of treating cases that have been completely consolidated below as a single proceeding on appeal. *See* States' Response at 11-12 (discussing consolidation cases and Sup. Ct. Rule 18.2, which provides that once a direct appeal from a district court judgment is filed under a direct review statute such as the Expediting Act, "[a]ll parties to the proceeding in the district court are deemed parties entitled to file documents in this Court"). These judicial practices recognize the fundamental principle that where, as here, there is one underlying controversy — not two — a court must generally have the whole controversy pending before it in order for its adjudication to be efficient and effective.

Microsoft has not shown why this Court should deviate in this proceeding from the normal appellate practice with respect to fully consolidated cases. Indeed, it acknowledges that the practical result of this Court reviewing the United States' case but not the States' case would be highly undesirable, in that having the "two appeals . . . proceed in separate courts" would "delay[] ultimate resolution of the two cases." Microsoft Juris. Statement at 28. *See also* States' Response at 9-10 (responding to Microsoft's argument that such delay is actually a reason for this Court not to hear *either* of Microsoft's appeals).

Moreover, Microsoft has not suggested, let alone demonstrated, that its interests would be unfairly undermined by direct review of the States' case as an aid to review of the Final Judgment in the United States' case under the Expediting Act. Indeed, Microsoft's acknowledgment that a two-tracked appeal would delay "ultimate resolution of the two cases" confirms that the legitimate interests of all parties would be furthered by this Court's consideration of both consolidated cases, should it decide to accept the United States' case. In light of the public interest in judicial economy and finality of resolution that would be injured by piecemeal appeals, it is appropriate for this Court to resolve the entire Final Judgment now.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari before judgment in the States' case in aid of its jurisdiction to review the Final Judgment pursuant to the Expediting Act.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The petition for a writ of certiorari before judgment presents the same issues that Microsoft Corporation has presented in its jurisdictional statement (No. 00-139):

1. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by engaging in a course of exclusionary conduct to protect and maintain its personal computer (PC) operating system monopoly.

2. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by attempting to monopolize the market for Web browsers.

3. Whether the district court erred in holding that Microsoft violated Section 1 of the Sherman Act, 15 U.S.C. 1, by tying its Internet Explorer Web browser to its Windows operating system through contracts and technological artifices.

4. Whether any of the district court's procedural and evidentiary rulings constituted an abuse of discretion requiring reversal of the judgment.

5. Whether the district court abused its discretion by ordering structural separation of Microsoft into two entities and transitional restrictions on its conduct.

6. Whether the district court erred in dismissing Microsoft's counterclaim under 42 U.S.C. 1983, alleging that state attorneys general, under color of state law, sought relief in this case that would deprive Microsoft of its rights under federal copyright law.

7. Whether the district judge's extrajudicial comments about the case require reversal of the judgment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings of fact of the district court are reported at 84 F. Supp. 2d 9 (J.S. App. 46-246).[1] The conclusions of law of the district court are reported at 87 F. Supp. 2d 30 (J.S. App. 1-43). The final judgment of the district court is reported at 97 F. Supp. 2d 59 (J.S. App. 253-279). The order of the district court certifying the case under the Expediting Act (J.S. App. 284-285) is not yet reported.

[1] "J.S. App." refers to the appendix to the jurisdictional statement filed in No. 00-139. See Pet. 1 n.1.

JURISDICTION

The judgment of the district court was entered on June 7, 2000. A notice of appeal was filed on June 13, 2000, and the case was docketed in the court of appeals on that date (D.C. Cir., No. 00-5213). Petitioners filed a petition for writ of certiorari before judgment on August 16, 2000. 28 U.S.C. 2101(e). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed a civil complaint in the United States District Court for the District of Columbia alleging that Microsoft Corporation has engaged in an anticompetitive course of conduct in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. At Microsoft's request, the district court consolidated the case "for all purposes" with a similar case brought by 20 States and the District of Columbia. See Nos. 98-1232 & 98-1233 Order (May 22, 1998). Following a 78-day trial, the court entered a single set of findings of fact (J.S. App. 46-246) and conclusions of law (*id.* at 1-43), in which the court held that Microsoft had violated Sections 1 and 2 of the Sherman Act and comparable state antitrust statutes. The court entered a single final judgment, requiring Microsoft to submit a plan to reorganize itself into two separate corporate entities and to comply with transitional injunctive provisions. *Id.* at 253-279; see Brief for the United States in Response to the Jurisdictional Statement 1-12 (00-139 U.S. Br.).

Microsoft filed two notices of appeal, one pertaining to the United States' action and one pertaining to the States' action. J.S. App. 280-283. On joint motion of the United States and the State plaintiffs, the district court certified, pursuant to the Expediting Act of 1903, as

amended, 15 U.S.C. 29(b), "that immediate consideration by the Supreme Court of the appeal taken herein is of general public importance in the administration of justice." J.S. App. 284. At Microsoft's request, the district court stayed the judgment pending appeal. *Id.* at 285. Microsoft has filed a single jurisdictional statement identifying both the United States and the States as appellees.[2]

Microsoft is opposed to expedition of its appeal. Among its objections, Microsoft argues that, even though the district court consolidated the federal and state actions and entered a single judgment, the Expediting Act authorizes the Court to accept jurisdiction over the appeal only insofar as it challenges the judgment on the United States' action. Microsoft contends that the States, consequently, are not entitled to participate as appellees in this Court. J.S. 27. The United States and the States disagree. See 00-139 U.S. Br. 29 n.30; 00-139 States' Response to Microsoft's Jurisdictional Statement 5-12 (00-139 States' Response). But as a precautionary measure, the States have also filed a petition for writ of certiorari before judgment, which is the subject of this brief. The States urge that, if this Court concludes that the Expediting Act does not authorize the Court to accept jurisdiction over Microsoft's appeal insofar as it challenges the judgment on the States' action, the Court should allow the States to participate in the proceedings in this Court by granting the petition and consolidating the case on writ of certiorari with the case on appeal.

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[2] The court of appeals suspended proceedings on Microsoft's appeal pending this Court's action on the jurisdictional statement. See Nos. 00-5212 & 00-5213 Orders (June 19, 2000).

ARGUMENT

1. The United States submits that Microsoft's appeal from the district court judgment, which grants the United States equitable relief under the Sherman Act, 15 U.S.C. 1, 2, presents a matter of "general public importance in the administration of justice" within the meaning of the Expediting Act, 15 U.S.C. 29(b). This Court should therefore note probable jurisdiction and undertake direct review of that judgment. See 00-139 U.S. Br. 13-30. If the Court does so, the Court should allow the States to participate as appellees. The district court consolidated the United States' antitrust action with the States' antitrust action, and the court conducted a single trial and entered a single judgment that granted the States identical equitable relief under the Sherman Act and analogous state antitrust laws. In the circumstances presented here, the States were "parties to the proceeding in the district court." Sup. Ct. R. 18.2. They are therefore entitled to participate in the proceedings before this Court and to defend the district court's judgment. Cf. *United States* v. *AT&T Co.*, 714 F.2d 178, 182 (D.C. Cir. 1983) ("upon certification all parties, including intervenors, must pursue *all* matters on appeal to the Supreme Court").

2. If the Court agrees that the appeal meets the Expediting Act's criterion, but concludes that the Expediting Act does not permit the States to participate as appellees, the Court should review the judgment rendered on the States' complaint simultaneously through the mechanism of a writ of certiorari before judgment in the court of appeals. See 28 U.S.C. 1254(1), 2101(e). This Court's rules provide that certiorari before judgment is available "upon a showing that the case is of such imperative public importance as to

justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. That standard is satisfied here.[3]

As we have explained in our response to Microsoft's jurisdictional statement, Microsoft's appeal from the district court judgment presents a matter of general public importance in the administration of justice that warrants direct review by this Court. See 00-139 U.S. Br. 13-18. That judgment embraces both the United States' action and the States' action, which were consolidated precisely because they raise similar claims and present essentially identical issues. Given the close relationship between the United States' action and the States' action, the Court is justified in departing from "normal appellate practice" and granting the writ to ensure that the United States' action and the States' action remain consolidated for purposes of appeal.

The Court has granted certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance are already pending before the Court and where it is considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." Robert L. Stern et al., *Supreme Court Practice* 42 (7th ed. 1993). Indeed, the Court has done so a number of times. See, *e.g.*, *National Org. for Women, Inc.* v. *Idaho*, 455 U.S. 918 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 n.1 (1963); *Taylor* v. *McElroy*, 360 U.S. 709,

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[3] The Court's power to grant certiorari before judgment extends to petitions filed by the party that prevailed in the district court. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 688-687, 690 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 294-295 (1935).

710 (1959); *Reid* v. *Covert*, 354 U.S. 1, 4-5 (1957); *Brown* v. *Board of Educ.*, 344 U.S. 1, 3 (1952); see also *Roe* v. *Wade*, 410 U.S. 113, 123 (1973) (noting that a petition for certiorari before judgment would have been "preferable" to obtain review of issues relating to declaratory relief that were "necessarily identical" to issues raised on appeal of injunctive relief).

Certiorari before judgment would be particularly appropriate here in light of the fact that the United States' action and the States' action were consolidated below and resulted in a single final judgment that awarded the United States and the States the same injunctive relief. Because the issues on appeal are essentially identical, this Court's decision would necessarily control the outcome of any proceedings in the court of appeals and, as a practical matter, constrain the court of appeals from taking any independent action. See *Clinton* v. *City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (certiorari before judgment would be appropriate "[i]n light of the public importance of the issues involved, and the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals").

The States have been significant participants in the proceedings below and have an important perspective on the issues. By granting the States' petition and consolidating the case on certiorari with the case on appeal, the Court would ensure that it has the benefit of the views of all of the parties that participated in the district court proceedings.[4]

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[4] Of course, the States should remain aligned with appellee United States for purposes of the submission of briefs on the merits on Microsoft's appeal from the district court's judgment.

CONCLUSION

If the Court notes probable jurisdiction under the Expediting Act in No. 00-139, but concludes that the States are not properly appellees in that case, the Court should grant the petition for certiorari before judgment.

Respectfully submitted.

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AUGUST 2000

No. 00-261

Supreme Court, U.S.
FILED
AUG 23 2000

IN THE

Supreme Court of the United States

STATE OF NEW YORK, *EX REL.*
ATTORNEY GENERAL ELIOT SPITZER, *ET AL.*,

Petitioners,

—v.—

MICROSOFT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

MICROSOFT'S BRIEF IN OPPOSITION

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August 23, 2000

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List of Parties and Rule 29.6 Statement

The parties to the consolidated proceedings before the United States District Court for the District of Columbia were respondent Microsoft Corporation, plaintiff the United States of America and petitioners the District of Columbia and the States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, South Carolina, Utah, West Virginia and Wisconsin. South Carolina withdrew from the case during trial.

Microsoft Corporation has no corporate parents, and no publicly held company owns 10% or more of Microsoft Corporation's stock.

Respondent Microsoft Corporation ("Microsoft") respectfully requests that the Court deny the States' petition for a writ of certiorari before judgment.[1]

Reasons Why the Petition Should Be Denied

If the Court denies the direct appeals in No. 00-139, then the States' petition obviously should be denied, and both of Microsoft's appeals should be remanded to the court of appeals. For the reasons stated in Microsoft's jurisdictional statement and reply in No. 00-139, the Court should follow this course, which will result in Microsoft's appeals being heard by a single court—the court of appeals—in accordance with normal appellate practice. The States' petition also should be denied because the case does not satisfy Rule 11's demanding standard for petitions for certiorari before judgment.

I. This Case Is Not of Such Imperative Public Importance as To Require Immediate Review by This Court.

The States seek to invoke the jurisdiction of this Court pursuant to Rule 11, which provides that a petition for writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." The States have not shown—nor can they show—that their case meets that very demanding standard.

This Court has "rarely" exercised its power to grant certiorari before a court of appeals has had an opportunity to review the decision below. *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958). In fact, certiorari before judgment has typically

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[1] The States explain that they have filed their petition as a "precautionary measure" (Pet. at 1; *see also id.* at 2) to be considered if the Court determines that the Expediting Act, 15 U.S.C. § 29(b), does not confer jurisdiction over Microsoft's appeal of the States' separately-filed action in No. 00-139.

been granted only "in cases of great constitutional significance and of extraordinary national importance for other reasons." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.20, at 199 (7th ed. 1993) (footnote omitted). The States concede as much, noting that certiorari before judgment has been granted only "where immediate Supreme Court review was necessary to resolve expeditiously questions of *exceptional and wide-ranging public importance*." (Pet. at 5 (emphasis added).) This is not such a case.

Although the judgment below is a threat to Microsoft's corporate existence and raises substantial issues of law, the States' suggestion that this case involves important issues of constitutional dimension similar to those present in the cases cited in their petition (Pet. at 2, 5, 7) is unfounded. *See Mistretta* v. *United States*, 488 U.S. 361, 362 (1989) (constitutionality of federal sentencing guidelines); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667 (1981) (constitutionality of Executive Orders resolving Iran hostage crisis); *United States* v. *Nixon*, 418 U.S. 683, 703 (1974) (validity of President's broad assertion of executive privilege); *Reid* v. *Covert*, 354 U.S. 1, 3 (1957) (constitutionality of court marshal proceedings against civilians); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954) (constitutionality of racial segregation in public schools).

The States make little effort to explain why this case meets the requirements of Rule 11. Instead, they baldly assert that the case poses "the most pressing and important public questions under the antitrust laws to come before this Court since . . . 1974." (Pet. at 6.) Even if that were true, the case is still a far cry from constitutional crises such as Watergate that threaten the failure of government. This is simply not one of the handful of extraordinary cases where certiorari before judgment is appropriate.

II. Granting the States' Petition Would Be Contrary to Normal Appellate Practice.

The States devote the majority of their petition to arguing that certiorari before judgment here would "aid" the Court in its direct review of the DOJ's case and avoid having Microsoft's two appeals heard by different courts. The States claim that Microsoft is asking the Court to "deviate in this proceeding from the normal appellate practice with respect to fully consolidated cases." (Pet. at 9.) But if the States' case is not subject to the Expediting Act, which is the necessary premise of their petition, then it is the States that are requesting a dramatic departure from normal appellate practice. One need only review the four questions presented in the States' petition (which the DOJ characterizes as seven different questions in its brief supporting the States' petition) to see that this case is wholly unsuitable for a grant of certiorari in its present posture.[2] Rather than presenting narrow legal issues that are plainly worthy of this Court's consideration, the States ask the Court to conduct sweeping inquiries into whether the district court's findings of fact and conclusions of law regarding each of the basic legal theories of this case—together with the unprecedented relief awarded—are sustainable. Such plenary review of a complex factual record that raises a broad array of legal and procedural issues would impose substantial burdens on the Court and would be contrary to the Court's normal certiorari practice.

The States assert that granting certiorari "would be consistent with the Court's practice of ensuring that an entire consolidated proceeding is before it on direct review." (Pet. at 9.) There is no such practice. In *United States* v. *National*

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[2] If the Court grants this petition, the Court should review the States' case in its entirety. The "questions presented" would thus include all of the issues set out in Microsoft's jurisdictional statement in No. 00-139, including the States' claims under their own antitrust statutes and Microsoft's counterclaims under 42 U.S.C. § 1983.

Association of Securities Dealers, Inc., 422 U.S. 694, 703 n.12 (1975), this Court heard a direct appeal of an antitrust action brought by the DOJ pursuant to its then-mandatory jurisdiction under the Expediting Act. The Court nevertheless denied a petition for certiorari before judgment in a closely-related private action that had been considered together with the DOJ's action in the district court. *See* 422 U.S. at 700 n.5. It is thus inaccurate to suggest, as the States do, that this Court invariably grants certiorari before judgment in such circumstances so that closely-related actions can be considered together. In any event, certiorari before judgment is not appropriate unless the case satisfies the standard set out in Rule 11, which this case clearly does not.

The States also wrongly suggest that "consolidation of the related appeals in this Court offers the only way to resolve the entire judgment." (Pet. at 7.) In each of the cases on which the States rely (*id.* at 6-8), this Court had *mandatory* jurisdiction over the primary case, and thus the only way to avoid having related cases resolved by different courts was to grant certiorari before judgment. *See Roe* v. *Wade*, 410 U.S. 113 (1973) (review of decision of three-judge panel, which, under 28 U.S.C. §1253, was appealable only to Supreme Court); *Brown* v. *Board of Education*, 344 U.S. 1 (1952) (same); *Reid* v. *Covert*, 354 U.S. 1 (1957) (review of decision of district court striking down act of Congress, which, under 28 U.S.C. § 1252 (now repealed), was appealable only to Supreme Court).[3] Here, the Court

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[3] The States improperly rely on *Clinton* v. *City of New York*, 524 U.S. 417 (1998), for the proposition that certiorari before judgment is warranted when one of the parties to a consolidated proceeding is entitled to a direct appeal to the Supreme Court. (*See* Pet. at 7-8.) The Court ruled in *Clinton* that certiorari before judgment was not necessary because 2 U.S.C. § 692(b) provided the Court with jurisdiction over *both* of the appeals at issue. 524 U.S. at 429 & n.14. Justice Scalia's view that certiorari before judgment would have been appropriate in *Clinton* was based on the "public importance" of the Court's immediate consideration

does not have mandatory jurisdiction over *either* of Microsoft's appeals, and thus has a superior option available to it to ensure that the entire proceeding is reviewed by a single court. The Court has unqualified discretion under the Expediting Act to remand the DOJ's action to the court of appeals and equally unqualified discretion to deny the States' petition for certiorari. The Court should exercise that discretion so that both cases can proceed along the normal course of appellate review.

The court of appeals can give full consideration to all of the issues relevant to both of Microsoft's appeals. By ordering that the appeals be heard immediately by the court sitting *en banc*, the court of appeals has demonstrated that it is ready, willing and able to deal with those appeals appropriately.

Conclusion

For the foregoing reasons, the States' petition for writ of certiorari before judgment should be denied.

Respectfully submitted,

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of the constitutionality of the Line Item Veto Act. *Id.* at 455 (Scalia, J., concurring in part and dissenting in part). As noted previously, this case does not raise issues with similar consequences for the ongoing operations of the federal government.

SUPREME COURT OF THE UNITED STATES

MICROSOFT CORPORATION

00–139 *v.*

UNITED STATES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NEW YORK, EX REL. ELIOT SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL.

00–261 *v.*

MICROSOFT CORPORATION

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00–139 and 00–261. Decided September 26, 2000

In No. 00–139, the direct appeal is denied, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit. The Clerk is directed to issue the judgment forthwith.

In No. 00–261, the petition for a writ of certiorari before judgment is denied.

JUSTICE BREYER, dissenting in No. 00–139.

I would note probable jurisdiction in this case. 15 U. S. C. §29(b). The case significantly affects an important sector of the economy—a sector characterized by rapid technological change. Speed in reaching a final decision may help create legal certainty. That certainty, in turn, may further the economic development of that sector so important to our Nation's prosperity.

I recognize that there are competing considerations. A court of appeals proceeding would likely narrow, focus, and initially decide the legal issues now presented here. It

would thereby facilitate any later deliberation in this Court. Nonetheless, I believe this Court can consider the issues fully now by taking additional briefs and by granting additional time for oral argument, if necessary. Consequently, I would hear the appeal.

STATEMENT OF CHIEF JUSTICE REHNQUIST.

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm, and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

28 U. S. C. §455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific instances in which disqualification is required, including those instances where the child of a Justice "[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding." 28 U. S. C. §455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's non-pecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those

interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with §455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under §455(a) "is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U. S. 540, 548 (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. *See ibid.*; *In re Drexel Burnham Lambert, Inc.*, 861 F. 2d 1307, 1309 (CA2 1988). I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters. Therefore I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son's representation and the matters before this Court relate to Microsoft's potential antitrust liability. A decision by this Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts. But, by virtue of this Court's position atop the federal judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to §455(a) seems contrary to the "reasonable per-

son" standard which it embraces. I think that an objective observer, informed of these facts, would not conclude that my participation in the pending Microsoft matters gives rise to an appearance of partiality.

Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.